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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1151

JOSEPH COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on December 16, 1966.

CITATION TO OPINION BELOW

The opinion and judgment of the United States Court of Claims are unreported as yet and are printed as Appendix A to the petition for a writ of certiorari in the case of *David M. Goodman v. United States*, filed simultaneously with this petition.[1]

[1] Page references herein to the opinion of the Court of Claims will be to Appendix A of the petition in the *Goodman v. United States* case.

JURISDICTION

The opinion of the Court of Claims was rendered on December 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

On the appeal of a "veterans preference eligible" to the Civil Service Commission, have the rights of such veterans preference eligible been violated under the Due Process Clause of the Fifth Amendment to the United States Constitution and the provisions of 5 C.F.R. § 22.101, *et seq.*, promulgated by the Commission under Section 14 of the Veterans Preference Act of 1944, where: (a) the chief witness against the employee was not present at the Commission hearing to testify, but rather the employing agency relied upon expurgated and blocked-out statements of that witness and refused to permit the employee to see the complete statements although requested by the employee; (b) the employing agency refused to produce at the Commission hearing for cross-examination its employees, under its control and command, upon whose statements it relied before the Commission, and whose presence had been requested by the employee through the Commission; and (c) the employing agency relied upon unsworn statements relating to the facts and circumstances of the charges against the employee, together with prejudicial remarks of a trial judge in a criminal proceeding.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution. Also involved are Section 14 of the Veterans Preference Act of 1966, 58 Stat. 390, 5 U.S.C. § 863, and Sections 22.101, *et seq.* of the Civil Service Commission Regulations, 5 C.F.R. § 22.101, *et seq.*

The constitutional provision, statute and pertinent portions of the regulations involved are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Petitioner is a veteran of World War II who first began his employment with the Bureau of Customs in 1942. [Tr., Ct. Cls., p. 178].[2] After military service in World War II, petitioner became a customs inspector in 1947 at the Port of New York. He continued in that position until November 5, 1957, when petitioner was charged by his employing agency, the Bureau of Customs, with having improperly examined the baggage of one Domenico Guarna, who arrived in New York City on the SS Cristoforo Colombo on September 25, 1956. [App. A, p. A-25] Petitioner was also charged with having made a false statement under oath on October 11, 1957, in that he denied having previously known Domenico Guarna. [Ibid.]

Petitioner responded to the charges by making a complete denial. [App. A., p. A-26] Petitioner was thereupon removed by the Bureau of Customs from his position as a customs inspector December 8, 1957. [Ibid.] Subsequently, petitioner was indicted for alleged complicity in a smuggling conspiracy between Guarna and Customs Bureau employees. [App. A, p. A-27] This indictment was quashed on October 27, 1959. [Ibid.]

Although petitioner filed an appeal on December 12, 1957, to the Civil Service Commission, his appeal before the Civil Service Commission was not heard until September 25, 1960. [App. A, pp. A-27, 30]

On May 2, 1960, the Customs Bureau submitted to the Civil Service Commission an unsworn statement by the Acting Commissioner of Customs relating to the facts and circumstances surrounding the charges against

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[2] Citations are to original record in the court below, portions of which have been designated and certified to this Court.

petitioner. [App. A, p. A-28] Submitted with the statement were a number of expurgated statements of witnesses, teletypes, and an extract from a sworn statement by Guarna, a smuggler, dated November 22, 1957. [App. A, p. A-28] Two sworn statements of Guarna had been taken by Customs Service investigative agents, one on October 1, 1957 and another on November 22, 1957. [App. A, p. A-22] The Customs Service believed that ". . . Guarna did not tell the complete truth on October 1, 1957, but [the Customs Service] believed that his statement of November 22, 1957, was truthful." [Ibid.] Also submitted were extracts of prejudicial remarks made by the trial judge in the criminal proceeding in which petitioner had been acquitted. [App. A, pp. A-27-28]

On June 16, 1960, petitioner submitted an affidavit to the Civil Service Commission in which he objected to the documents submitted to the Commission by the Customs Bureau on the grounds that the statements were extracts and incomplete. [App. A, p. A-30] He requested to see all statements of Domenico Guarna whose expurgated statement of November 22, 1957 had been provided to the Commission by the Customs Bureau, and to have present at the Commission hearing those employees of the Customs Service whose statements had been submitted to the Commission. [Joint Ex. 1(d)C; App. A, p. A-30] Customs decided that none of the employees requested would be produced at the hearing. [App. A, p. A-30] Of the two inconsistent Guarna affidavits, only extracts of the later November 22, 1957 Guarna statement were shown to petitioner. [App. A, p. A-28]

At the hearing before the Commission hearing examiner, on September 25, 1960, counsel for the petitioner again objected to the use of expurgated statements of Guarna, the witness to the alleged charges against petitioner, and the refusal of the employing agency to produce the employees upon whose statements it was relying. [Joint Ex. 1(c), p. 132]

On November 3, 1960, the hearing examiner approved the removal of petitioner, and the Civil Service Commission Board of Appeals and Review affirmed on April 13, 1961. [App. A, pp. 30-32]

Petitioner then brought suit in the Court of Claims for loss of salary resulting from the violations of his constitutional and statutory rights, consisting of the use of expurgated and blocked-out statements of a chief witness against him, the refusal of the employing agency to produce witnesses, employees of the Bureau of Customs, who had been requested by the petitioner and who were Customs employees, and the use of the unsworn statements and irrelevant and prejudicial material from criminal proceedings in which petitioner had been acquitted. The Court of Claims affirmed the dismissal.

REASONS FOR GRANTING WRIT

The principal question presented by this petition is whether a Government employee, a veterans preference eligible, can be denied an opportunity to see the full contents of statements of witnesses which are presented to the Civil Service Commission by the employing agency and relied upon in affirming the dismissal of the employee, in proceedings under Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. § 863. An important subsidiary question also is presented by the interpretation by the court below of this Court's decision in *Williams v. Zuckert*, 371 U.S. 531, *case remanded on petition for rehearing*, 372 U.S. 765 (1963), in which this Court held that a veterans preference eligible is entitled to the presence of witnesses at the Civil Service Commission hearing on his appeal where he has made a timely and sufficient attempt to obtain the presence of those witnesses or has made a showing that he was justified in failing to make such attempt.

In the present case, the Civil Service Commission considered and relied upon expurgated, blocked-out and

unsworn statements of the chief witnesses against petitioner. In affirming the employee's dismissal based upon a record consisting of those expurgated, blocked-out and unsworn statements of the chief witnesses, and refusing to permit the employee to see the full contents of the statement of witnesses, and to have the employees of the employing agency present for the purpose of cross-examination, the Commission denied the veteran the procedural rights afforded to him under the Fifth Amendment, the Veterans Preference Act and the Commission's regulations.

In *Jencks v. United States*, 353 U.S. 657 (1957), this Court required the full disclosure of statements of a witness in criminal proceedings where the Government relied upon that witness in the criminal proceeding.

The reasoning in the *Jencks* case has since been applied to administrative proceedings. *Communist Party of the United States v. Subversive Activities Control Board*, 254 F.2d 314, 327-328 (D.C. Cir. 1958), *aff'd* 367 U.S. 1 (1961); *Carlisle v. Rogers*, 262 F.2d 19 (D.C. Cir. 1958); *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403, 408 (2d Cir. 1958). *Petrowicz v. Holland*, 142 F. Supp. 369 (E.D. Pa. 1956) (Immigration and Naturalization Service, Dept. of Justice); *Schere v. Christenberg*, 179 F. Supp. 900, 905-906 (S.D.N.Y. 1959) (Post Office Dept.). See also, *In re Kosuga*, 7 Ad. L. (2d Ser.) (Decisions) 379 (1957) (Dept. of Agriculture). See generally, Note, 57 Mich. L. Rev. 420 (1959); Note, 11 Stan. L. Rev. 297, 326-332 (1959); Note, 68 Yale L. J. 1409 (1959). Permitting the veterans preference eligible to see the full contents of statements used against him in a Commission proceeding is a fundamental principle of evidentiary fair play, and the Veterans Preference Act clearly contemplates that the veteran be accorded a fair hearing, with a full opportunity to see all of the evidence against him and to respond to it.

Absent a claim of governmental privilege, which has not been asserted in this case, there is no possible justification for denying production of *all* of the witness' statement — not just the portion which the employing agency decides is "truthful". The *Jencks* rule is a necessary corollary to 5 C.F.R. § 22.603 (1958 Ed.) of the Civil Service Commission regulations providing for the opportunity to introduce evidence at the Commission hearing and to cross-examine witnesses. Barred from seeing the full contents of accusatory statements, the veteran is deprived of information which could exonerate him, or, most importantly in a dismissal proceeding, could reflect on the severity of the punishment of dismissal, which is ruinous to the veteran, his family and his reputation.

The Civil Service Commission, moreover, in its regulations, has recognized the right of the veterans preference eligible to see the evidence against him. 5 C.F.R. § 22.401(c) (1958 Ed.), provides:

> Evidence available to both parties. Relevant representations shall be discussed with both parties to the appeal and shall be available for review by them.

In its opinion, the court below interpreted this provision of the regulations to permit the blocking-out and expurgation of sworn statements of an important witness, not present for cross-examination at the Commission hearing on the reasoning that the veteran had no right to see portions of statements not presented to the Commission, stating:

> [P]laintiffs were tried on the bases of the evidence presented and not on the bases of any information that was withheld. [App. A, p. A-16]

As this interpretation applied to the present case, it permitted the employing agency to withhold a sworn statement given by a chief witness, Domenico Guarna,

on October 1, 1957, and to block out certain inconsistent portions of a later sworn statement taken on November 22, 1957, even though petitioner specifically demanded to see the witness' full statements. In the Findings of Fact portion of the opinion of the court below, the court described the relationship of the two sworn statements in the following manner.

> Guarna was questioned by the Bureau of Customs on a number of occasions. On October 1, 1957, and November 22, 1957, the Bureau took statements from him. *The Bureau felt that Guarna did not tell the complete truth on October 1, 1957, but believed that his statement of November 22, 1957, was truthful.* [App. A, p. A-22; emphasis added.]

Although petitioner made his request well in advance of the Civil Service Commission hearing, through a sworn affidavit to the Commission, to obtain all of the statements of the smuggler Guarna, the most critical witness against him, the employing agency revealed only those portions of the sworn statement of November 22, 1957, which *it* felt were "truthful".

Under the decision of the court below, an employing agency may select those portions of a witness' statements which it deems to be "truthful", and the veteran may not explore the matter further, may not test one statement against the other, may not challenge the witness' credibility by the most obvious means available.

This Court has stated unequivocally that the right to see the evidence in administrative proceedings of this nature is fundamental.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where Governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

> While this is important in the case of documentary evidence, *it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy.* We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. [*Greene v. McElroy*, 360 U.S. 474, 496 (1959); emphasis added.]

It was of obvious advantage to the smuggler and admitted perjurer, Guarna, to tell the customs investigating agents what he believed they wanted to hear, regardless of the truth. This is not a case where the employing agency refused to reveal portions of statements or documents upon the grounds of national security interests, protection of informants, pending criminal action, or any other legitimate reason. Rather, the employing agency sought to benefit from parts of statements which supported their action of dismissal, yet withheld from the employee portions of documents and sworn statements which showed inconsistencies in the stories related by the chief witness.

The only justification for the blocking out of the sworn statements of the witness given by the court below was that the deletions resulted in the exclusion of evidence which tended to show that the petitioner had been bribed. [App. A, p. A-45] That the Customs Service was attempting to keep out prejudicial evidence is unlikely for it also presented to the Commission prejudicial remarks of the trial judge in the criminal proceedings, which contained many references to bribery and perjury charges not before the Commission. [Joint Ex. 1(d)9; App. A, pp. A-27-28] The Court below held the introduction of such prejudicial and irrelevant evidence to be "harmless error". [App. A, p. A-18]

If there was prejudicial material in the statements deleted, this fact did not justify the refusal of the em-

ploying agency to permit the veterans preference eligible to see the complete statements so that *he* could make the determination as to whether he would take the risk of presenting such prejudicial material in order to show that the witness had perjured himself. If there was a risk to run, it was a risk that the veterans preference eligible had a right to take. The employing agency could not unilaterally determine what was in the best interests of the veterans preference eligible in blocking out and deleting portions of statements of witnesses to be used and relied upon before the Civil Service Commission.

This Court has, in recent years, consistently held that an agency or the Civil Service Commission is bound by its own regulations with respect to the procedural rights afforded to the employee. In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court construed the Interior Department regulation giving an employee the right "to cross-examine any witness offered in support of the charges", as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee and upon which the employing agency relied.

In *Williams v. Zuckert, supra*, 371 U.S. 531, 372 U.S. 765, this Court held that a veterans preference eligible is entitled to the presence of witnesses at the Commission hearing where he has made timely and sufficient attempt to obtain the presence of those witnesses or has made a showing that he was justified in failing to make such attempt. In the present case, petitioner submitted an affidavit to the Civil Service Commission on June 16, 1960, some four months prior to the Commission hearing, in which he requested the presence of employees of the Bureau of Customs, whose statements were relied upon by the Bureau before the Civil Service Commission. [App. A, p. A-30] The Bureau refused to produce any of the employees whose presence as witnesses had been requested. [Ibid.]

The court below interpreted this Court's decision in *Williams v. Zuckert* to require that the requested witnesses ". . . were the petitioners' principal adversaries, or that they had submitted briefs in rebuttal to the petitioners' testimony, or more importantly, that the witnesses were aware that their presence had been sought." [App. A, p. A-14][3] Such a personal request, as required by the court below under the *Williams* decision, would have been in vain, since the employing agency, who controlled the witnesses, had decided that it would produce none of the witnesses requested. The Acting Commissioner of Customs testified in the court below that the decision not to permit any Customs Service employees requested by petitioner to appear at the Commission hearing probably was made by the Commissioner of Customs himself "* * * and if we were so advised not to appear, then we would not." [Tr., Ct. Cls., p. 78] The witnesses requested were important. The unsworn statement by the Acting Commissioner of Customs was relied upon by the Civil Service Commission in its decision affirming the dismissal of the petitioner. Also critical were customs agents who gave written statements that they saw a "warm" handshake between the petitioner and Guarna, which evidence was considered by the Commission in sustaining the charge that petitioner falsely swore he did not know Guarna. [App. A, p. A-32]

5 C.F.R. § 22.401(b) of the Civil Service Commission regulations provides:

> *Evidence.* Statements of witnesses shall be by affidavit when practicable, and relative to the adverse decision.

[3] These requirements appear to be in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Studemeyer v. Macy*, 320 F.2d 797 (1953), where it was held that the veteran's failure to contact the employees requested did not bar his right to the appearance of such witnesses if a demand had been made upon the employing agency for the appearance of the witnesses.

This Commission regulation is clear and unequivocal. The statements submitted by the petitioner to the Civil Service Commission were affidavits. Yet the statement submitted by the Acting Commissioner of Customs was unsworn, as were uncertified portions of testimony from the criminal proceedings. The unsworn statement of the Acting Commissioner was considered by the court below to be a "position" paper. [App. A, p. A-17] But in fact the statement contained many personal observations, and related many purported facts as to the weight of baggage brought into the country, the value of merchandise, etc., all of which was not subject to cross-examination by the veterans preference eligible. [Joint Ex. 1(d)B, quoted in part at App. A, pp. A-46, 47] The regulation obviously is intended to afford the highest degree of reliability possible in an administrative proceeding where there are numerous statements of witnesses who are not present for cross-examination. In the present case, not only did the Customs Bureau refuse to have the witnesses present for cross-examination, but it relied upon an unsworn statement of an official relating to many facts and circumstances which were not within the individual's personal knowledge.

The decision of the court below finding the use of such unsworn statements not to be error in an administrative proceeding relating to the right of a veterans preference eligible to a fair hearing before the Civil Service Commission under the Veterans Preference Act is contrary to the decisions of this Court since *Vitarelli v. Seaton, supra,* in which this Court stated:

> *[I]t should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities.* For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical restraints in the making of ob-

> jections and in the tactical handling of his case which would not pertain in a case being tried before trained judges, *scrupulous observance of department procedural safeguards is clearly of particular importance.*
> [359 U.S. at 540; emphasis added.]

The decision of the court below has given judicial approval to a Civil Service Commission hearing in which: (1) the Commission relied upon expurgated affidavits of a critical witness against the employee, denying the employee's request to see the blocked-out portions of the affidavits; (2) the employing agency refused the employee's request for the presence at the Commission hearing of those employees whose statements were relied upon by the employing agency, and (3) the Commission considered and relied upon unsworn statements of witnesses in violation of its own regulations that statements of witnesses shall be by affidavit, if practicable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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